

**MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS**

FINAL STATEMENT OF REASONS

Hearing Date: July 29/2005

(1) Section(s) Affected: Title 16, California Code of Regulations, Section 1304.5

Updated Information

The Initial Statement of Reasons is included in the file and is accurate. The Medical Board of California held a hearing on July 29, 2005, and adopted Title 16, California Code of Regulations, Section 1304.5.

Local Mandate

A mandate is not imposed on local agencies or school districts.

Small Business Impact

This regulation will not have a significant adverse economic impact on business.

Consideration of Alternatives

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the board/bureau/commission/program would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Objections or Recommendations/Responses

The following two written comments/objections were made regarding the proposed action:

(1) From: Karen Ehrlich, LM, CPM,

Received by E-mail: July 12, 2005

Objections/concerns taken from the above listed E-mail correspondence:

1. The current language would actually make the Division of Licensing's actions inconsistent and perhaps even capricious."

This objection was rejected because precedent decisions will help ensure the Medical Board of California's decisions for all applicant-respondents who have the same/similar issue whether the applicant-respondents are propria persona or represented by counsel.

2. It is important that any licentiate of the Medical Board of California have clarity about the bases that the Medical Board establishes for its regulatory functions over our professions. As currently written, Medical Board will be empowered by section 1404.5(sic) to establish precedent at will, and then to un-establish precedent at will.

This objection was rejected because Title 16, California Code of Regulations, Section 1304.5 applies only to applicant-respondents who have applied for a license within the Medical Board of California Division of Licensing's authority. The Medical Board of California, Division of Medical Quality already has the authority to set precedent decisions for licensees, Title 16, California Code of Regulations, Section 1364.40 and the language in Section 1364.40 is identical to the proposed Section 1304.5 language. Thereby, providing the Division of Licensing the same ability to help ensure all applicant-respondents will be treated in a consistent manner; as the Division of Medical Quality currently has for licensees. The Division of Licensing is required to provide the public a notice of intent to designate or withdraw designation of a precedent decision at a division meeting and interested parties may submit written comments for or against the proposed action.

3. While section (d) requires the division to provide notice, this notice would only go to those interested parties who have requested to be on the mailing list for all Medical Board notices. Thus many who could be affected by the adoption of such precedent-setting policies will be unaware of these pending actions.

Because the division has the right, under the proposed regulation, to both accept and reverse designations, there could be shifting ground under the feet of those whom the Medical Board regulates. Without strong, committed participation at each and every Medical Board meeting by representatives of each and every profession regulated by the Medical Board, this shifting ground could be used as inconsistent ground for regulatory functions and disciplinary policy. For any licentiates who must face disciplinary action, such actions against them could appear to be unfairly variable and unpredictable, especially if they are not given full warning of the upcoming changes, their effective dates, and the consequences involved.

These objections were rejected because the Medical Board of California post all notices for public meetings on the Board's Web site in addition to mailing notices to individuals on the interested parties mailing list. Proposed Title 16, California Code of Regulations, Section 1304.5 pertains to applicant-repondents not licentiates and precedent decisions help ensure all applicant-respondents will be treated in a consistent manner.

4. Also, section (d) does not require any oversight of each and every precedent decision by the Office of Administrative Law. This absence increases the appearance of the possibility that

this regulation could result in unfair and inconsistent decisions and / or disciplinary actions by the Medical Board.

This objection was rejected because California Government Code Section 11425.60 (c) requires the Medical Board of California to maintain an index of significant legal and policy determinations made in precedent decisions. In addition Board Counsel will send a copy of the signed Designation as a Precedent Decision, including a copy of the decision, to the Office of Administrative Hearings. The Office of Administrative Hearings maintains a file of precedent designations for reference by Administrative Law Judges. The same procedure applies when a Precedent Decision is reversed.

(2) From: Faith Gibson, LM
Executive Director, ACCM;
California College of Midwives

Received by facsimile: July 18, 2005
Received by U.S. Mail: July 20, 2005

Objections/concerns taken from the above listed correspondence:

1. The members of the California College of Midwives are concerned about impact of the language of this proposed regulation on all licentiates of Medical Board. Specifically, we are concerned that the designation by the MBC of certain decisions as "precedent setting" will, in essence, circumvent the customary safeguards of the legislative, regulatory process and appellant court system and grant quasi-legislative powers to the Board that are without the customary oversight and participation of the public.

This objection was rejected because Title 16, California Code of Regulations, Section 1304.5 applies only to applicants who have applied for a license with the Division of Licensing's authority. The Medical Board of California, Division of Medical Quality already has the authority to set precedent decisions for licensees, Title 16, California Code of Regulations, Section 1364.40. The language in Section 1364.40 is identical to the proposed Section 1304.5 language. Thereby, providing the Division of Licensing the same ability to help ensure all applicant-respondents will be treated in a consistent manner; as the Division of Medical Quality currently has for licensees. The Division of Licensing is required to provide the public a notice of intent to designate or withdraw designation of a precedent decision at a division meeting and interested parties may submit written comments for or against the proposed action. California Government Code Section 11425.60 gives the authority to a California agency to designate a precedent decision. Precedent decisions do not circumvent the customary safeguards of the legislative, regulatory process and appellant court system.

2. In the ordinary course of events, major policy decisions are determined by authorizing legislation or at the very least, occur as a result of regulatory language which has specific authorizing legislation behind it. These proceedings are open to public input during formulation and public oversight before being implemented via review by the Office of Administrative Law.

This objection was rejected because California Government Code Section 11425.60 gives the authority to a California agency to designate a precedent decision. The proposed Title 16, California Code of Regulations, Section 1304.5 is the regulatory process regarding California Government Code Section 11425.60 as it applies to the Medical Board of California, Division of Licensing. In addition, proposed Title 16, California Code of Regulations, Section 1304.5 requires the following: Notice of intent to designate or withdraw designation of a precedent decision shall be given with the notice of a division meeting. Interested persons may submit written comments for or against the action. The Office of Administrative Hearings maintains a file of precedent designations and reversals of precedent designations for reference by Administrative Law Judges.

3. The problem with establishing “precedent decisions” as an executive function of the MBC is that they would have the equivalent force of a legislative act or appellant court decision but without any of the safeguards noted above. Under the proposed regulation, precedent decisions would result from specific prosecution of individual licentiates on charges of some impropriety. These situations may themselves be non-representative, since prosecution usually does not move forward unless the circumstances appear to be uniquely egregious.

The ability of the accused to afford effective legal representation, the experience and skill of the defense attorney, eclectic circumstances such as professional or family pressure, the role of medication (or substance abuse), mental impairment, financial hardship, etc., may all result in less than optimal ability of the respondent to fully defend him or herself. It is common knowledge that settlement agreements are sometimes entered into because the accused can no longer hold out against the substantial power and unlimited resources of the Medical Board.

These objections were rejected because Title 16, California Code of Regulations, Section 1304.5 applies only to applicant-respondents who have applied for a license within the Division of Licensing’s authority not licentiates. The Division’s use of precedent decisions does not take away an applicant’s ability to appeal a decision. Precedent decisions also help ensure Medical Board of California, Division of Licensing decisions for like issues are the same for all applicant-respondents who have the same issue whether the applicant-respondent is propria persona or represented by counsel, and/or agrees to a stipulated settlement or goes through the administrative hearing process.